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09/829,032	04/09/2001	Frank Venegas JR.	IDS-14402/14	8394

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/829,032
Filing Date: April 09, 2001
Appellant(s): VENEGAS, FRANK

John G. Posa
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed August 9, 2006 appealing from the Office action mailed March 1, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,220,740	Brault	6-1996
5,833,556	Ferrari	11-1998
4,145,044	Wilson	3-1979
6,348,028	Cragg	2-2002

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a

> person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1 and 5-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brault 5,220,740 in view of Ferrari 5,833,556. Brault discloses a support apparatus comprising a sign having a rectangular post; a base (14) having a fillable body, a collar potion (near 16) including rectangular bore, a grasping handle (22), a set of wheels (12), wherein the base is fillable through the bore in the collar portion. Ferrari discloses a fillable base having a collar having an aperture, a fastener, and a post having a plurality of spaced apart through holes. Brault discloses all of the limitations of the claimed invention except for the collar having one aperture, and the post having a plurality of spaced apart through holes. It would have been obvious to one having ordinary skill in the art to have modified Brault to having included the collar having an aperture, a fastener, and the post having a plurality of spaced apart through holes as taught by Ferrari for the purpose of adjusting the height of the stand to accommodate various heights when used as a basketball sign support, a traffic sign, a tennis net support or badminton game apparatus as discussed in column 3, liens 3ff of Brault. The weight used to fill the base is varied depending ton

the height of the post as discussed in column 3,lines 28ff (Brault) and the suggestion of the apparatus being used for various signs or games provides the motivation to modify the height adjust of the post.

Claims 1 and 5-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brault 5,220,740 in view of Wilson et al. (Wilson) 4,145,044. Brault discloses all of the limitations of the claimed invention except for the collar having one aperture, and the post having a plurality of spaced apart through holes. Wilson discloses a fillable base (20) having a collar (40) having an aperture, a fastener, and a post (44) having aperture, a fastener, and a post (44) having a plurality of spaced apart through holes. It would have been obvious to one having ordinary skill in the art to have modified Brault to having included the collar having an aperture, a fastener, and the post having a plurality of spaced apart through holes as taught by Wilson for the purpose of adjusting the height of the stand to accommodate various heights when used as a basketball sign support, a traffic sign, a tennis net support or badminton game apparatus as discussed in column 3, liens 3ff of Brault. The weight used to fill the base is varied depending ton the height of the post as discussed

in column 3,lines 28ff (Brault) and the suggestion of the apparatus being used for various signs or games provides the motivation to modify the height adjust of the post.

Claims 1 and 5-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brault 5,220,740 in view of Cragg 6,348,028. Brault discloses all of the limitations of the claimed invention except for the collar having one aperture, and the post having a plurality of spaced apart through holes. Cragg discloses a weighted base having a collar (26) having an aperture, a fastener, and a post (30) having a plurality of spaced apart through holes (32). It would have been obvious to one having ordinary skill in the art to have modified Brault to having included the collar having an aperture, a fastener, and the post having a plurality of spaced apart through holes as taught by Cragg for the purpose of adjusting the height of the stand to accommodate various heights when used as a basketball sign support, a traffic sign, a tennis net support or badminton game apparatus as discussed in column 3, liens 3ff of Brault. The weight used to fill the base is varied depending ton the height of the post as discussed in column 3,lines 28ff (Brault) and the suggestion of the apparatus

being used for various signs or games provides the motivation to modify the height adjust of the post.**(10)**

(10) Response to Argument

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the suggestion to combine is found within Brualt in column 3, lines 1ff which provides the motivation for combining the references by teaching that the support

stand can be "contemplated as a stand for traffic signs… for holding the basket in basketball…". This disclosure provides the examiner with the motivation or suggestion to combine the references since Ferrari, Wilson, and Cragg which all teach of adjustable basketball stands having a plurality of holes and a fastener for adjusting the height of the stand. Brault's teaching of his apparatus being a basketball, tennis or badminton apparatus stand leads one to modify the invention to have the capability of adjusting the height of the post for users depending on their height as suggested or motivated by Ferrari, Wilson, and Cragg since each reference teaches that height adjustability is well known and an old in the art of stands.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction

is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Kimberly T. Wood

Conferees:

Peter Cuomo PC

Carl Friedman CF